No. 89-1996

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ESTELLA HAYNES ROBINSON, ADMINISTRATRIX OF THE ESTATE OF WILLIE ROBINSON, JR., AND THE REPRESENTATIVE OF THE WRONGFUL DEATH BENEFICIARIES OF WILLIE ROBINSON, JR.; COMMILLA PERKINS AS REPRESENTATIVE OF THE HEIRS AT LAW OF PATRICIA ANN PERKINS, DECEASED, DEBRA ANN JOHNSON, A MINOR BY AND THROUGH JOHNNIE MAE JOHNSON, HER MOTHER AND NEXT FRIEND; AND DETRICK GRANBERRY, A MINOR BY HIS FATHER AND NEXT FRIEND, ALONZO GRANBERRY, AS REPRESENTATIVE OF THE WRONGFUL DEATH BENEFICIARIES OF SHALANDA GRANBERRY,

Petitioners,

v.

MTD PRODUCTS, INC., and HENRY M. BUMP,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONERS' REPLY BRIEF

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ESTELLA HAYNES ROBINSON, ADMINISTRATRIX OF THE ESTATE OF WILLIE ROBINSON, JR., AND THE REPRESENTATIVE OF THE WRONGFUL DEATH BENEFICIARIES OF WILLIE ROBINSON, JR.; COMMILLA PERKINS AS REPRESENTATIVE OF THE HEIRS AT LAW OF PATRICIA ANN PERKINS, DECEASED, DEBRA ANN JOHNSON, A MINOR BY AND THROUGH JOHNNIE MAE JOHNSON, HER MOTHER AND NEXT FRIEND; AND DETRICK GRANBERRY, A MINOR BY HIS FATHER AND NEXT FRIEND, ALONZO GRANBERRY, AS REPRESENTATIVE OF THE WRONGFUL DEATH BENEFICIARIES OF SHALANDA GRANBERRY,

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PETITIONERS' REPLY BRIEF

STATEMENT OF THE CASE

Respondents deny that there is a conflict in the circuits whether a pre-trial order should be narrowly construed when the issue is inherent in the language of the order

and no surprise to opposing counsel. However, respondents fail to discuss or analyze the conflicting standards of interpretation pursuant to Rule 16 of the Federal Rules of Civil Procedure in the cases raised by the petitioners. Furthermore, they do not comment on the assertions of Professors Moore and Wright that there is a split in the circuits on this issue. In fact, the respondents *never* state what type of standard should be used in the interpretation of pre-trial orders. Petitioners submit that respondents have not addressed the issue raised concerning the construction of pre-trial orders.

Also, there is one glaring factual inaccuracy in the respondents' statement of the case. Respondents claim that they were unaware that petitioners would seek a negligence *per se* instruction when they received the petitioners' response to their motion in limine to exclude evidence that the truck driver was not wearing his seat belt. Two negligence *per se* instructions along with petitioners' other instructions had been sent to the Court and opposite counsel in advance of the February 1, 1988 trial. (Tr. 11) The response to the motion in limine was filed on February 1, 1988. (R. 597) Respondents' assertions throughout their statement of the case that they were unaware of a negligence *per se* theory during trial are simply without the slightest shred of foundation.

The respondents also give an inaccurate impression in their version of the way the accident occurred. The respondents leave the inference that the white car made the entire pass of Mr. Bump's truck on a bridge on a two-lane highway. The uncontradicted testimony at trial was that the small white car began its attempt to pass at a point at least 300 feet from the bridge. (T. 1207 and Exhibit P-3) There was also other testimony that placed the distance much further back. (T. 214-217) This correction gives a clearer perspective of the events involved.

The Fifth Circuit has adopted a rule of narrowly construing pre-trial orders pursuant to Rule 16. This rule

is in direct conflict with the rules adopted by the First, Sixth, and Tenth Circuit Courts of Appeals which require a broad and liberal construction of pre-trial orders. Petitioners urge the Court to grant certiorari and follow the broad construction rule supported by a majority of the circuits and the treatise writers.

I. THERE IS A CONFLICT IN THE CIRCUITS CONCERNING WHETHER A PRE-TRIAL ORDER SHOULD BE NARROWLY CONSTRUED TO PRECLUDE ISSUES WHICH ARE INHERENT IN THE LANGUAGE OF THE ORDER AND NO SURPRISE TO OPPOSING COUNSEL OR SHOULD BE BROADLY CONSTRUED TO INCLUDE SUCH ISSUES.

In the case at bar, there can be little argument that the pre-trial order served its purpose by alerting counsel opposite that the failure to wear a seat belt was an issue in the litigation. It was admitted to be no surprise. (App. to Pet. for Cert. 43). Petitioners clearly laid out in the "Concise Summary of the Plaintiffs' Ultimate Facts" that Mr. Bump may have been thrown out of his seat because he was not wearing a seat belt. (App. to Pet. for Cert. 50). Further, the failure to wear his seat belt was the subject of an admission which was qualified by the respondents with a reservation to explain the stipulation to the jury. (R. 375)

Respondents even filed a motion in limine which stated that there was no duty for the respondent, Mr. Bump, to wear a seat belt. (App. to Pet. for Cert. 53) It is now plainly obvious that 49 C.F.R. § 392.16 (1984) does require a truck driver to wear his seat belt and is designed to protect other users of the highway. The seat belt insures the driver will remain in this seat during evasive maneuvers in crash situations.

The respondents deny that there is any conflict in the circuits on the interpretation of pre-trial orders. There is an unavoidable difference between the standards set by

the Fifth Circuit and those of the First, Sixth, and Tenth Circuits. This split is noted by Professor Moore in his treatise on civil procedure. Professor Moore supports the broad construction of pre-trial orders and states as follows:

> When interpretation of a pretrial order is necessary, the court should not follow an inflexible approach; pretrial orders should be liberally construed. There is, however, contrary authority.

3. J. Moore, Moore's Federal Practice ¶ 16.19, pp. 16-77, through 16-78 (2 ed. 1989).

Professor Moore cites the Fifth Circuit case of *Flannery v. Carroll*, 678 F.2d 125 (5th Cir. 1982) as the contrary authority. In the *Flannery* case, the Fifth Circuit set forth the following rule on the construction of pre-trial orders:

> District Courts are encouraged to construe Pretrial Orders narrowly, without fear of reversal. *Hodges*, 597 F.2 at 1014.

Flannery v. Carroll, 676 F.2d 126 (5th Cir. 1982).

On the other hand, the Tenth Circuit has adopted a rule requiring a broad construction of pre-trial orders. The case of *Century Refining Company v. Hall*, 316 F.2d 15 (10th Cir. 1963), states the broad construction rule and its rationale:

> But, while the Pre-trial Order should measure the dimensions of a lawsuit and govern its course in the absence of some good reason for departure, this does not mean that the Order should not be liberally construed to embrace all of the legal and factual theories inherent in the issues defined therein. Any other construction of the Pre-trial Order would tend to unduly constrict the trial of the case and defeat the central and salutary purpose of the Federal Rules of Civil Procedure to insure the trial of every lawsuit on its merits. It is a procedural tool to facilitate the trial of the lawsuit on its merits and not to

> defeat it on a technicality. We must not allow ourselves to construe the Pre-trial Order in the spirit of a common law pleading.

Id. at 19-20.

In the case at bar, the petitioners carefully identified the issues for trial pursuant to Rule 16. It is *extremely important* to note that in course of the trial there was no comment by respondents' counsel that they were surprised by the issue of the seat belt. In fact, counsel for respondents admitted it was no surprise. (App. to Pet. for Cert. 43-44). The numerous cases cited by respondents all involved some allegation of surprise or a failure to alert the court to an issue. The seat belt issue is inherent in the factual allegations and admissions in the pre-trial order. Under the broad construction rule, the issue is certainly preserved.

Petitioners urge this Court to grant certiorari in order to settle the conflict in the circuits. The Fifth Circuit has adhered to a rule of narrow construction which is simply out of step with the policy of the Federal Rules of Civil Procedure. This Court should adopt the broad construction rule supported by the majority of the circuits and the treatise writers.

II. THE INTERPRETATION OF THE SEAT BELT REGULATION IN LIGHT OF ITS REGULATORY HISTORY IS PROPER AND AN ISSUE OF NATIONAL IMPORTANCE.

The Petitioners requested two instructions concerning 49 C.F.R. § 392.16 which requires a truck driver to wear a seat belt. (App. 1a-3a). Petitioners vigorously argued at trial that the regulation protected other users of the highway by keeping the driver in his seat even after a collision. (App. 4a-5a). The Court refused to grant either instruction. (App. 1a-3a). Respondents cite no authority for their proposition that petitioners are barred from raising the regulatory history.

The petitioners requested proper instructions and the Court simply misinterpreted the purpose of the regulation. The regulatory history is informative and was obviously not in the possession of either side at trial. The history demonstrates beyond any serious argument that the regulation was designed to protect other users of the highway by aiding the truck driver's ability to take evasive maneuvers in crash situations. The people in the Robinson car who were injured and killed in the crash were surely part of the protected class.

The interpretation of 49 C.F.R. § 392.16 is of national importance. A decision by this Court that the regulation was designed to protect other users of the highway would benefit all the driving public and provide a meaningful penalty for non-compliance.

CONCLUSION

Petitioners request that this Court grant certiorari in order to rule on the split in the circuits concerning the interpretation of pre-trial orders under Rule 16 of the Federal Rules of Civil Procedure. The split in the circuits is recognized by the treatise writers, and the Court would provide needed guidance to the district courts in their interpretation of pre-trial orders by deciding this case. Petitioners would submit that the Court should adopt the broad rule of construction adhered to by the First, Sixth, and Tenth Circuit Courts of Appeals. This rule follows the purpose and spirit of the Federal Rules of Civil Procedure and is supported by the treatise writers and a majority of the circuits.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
MISSISSIPPI, DELTA DIVISION

Civil Action Nos. DC 84-221, -224, -227, -228, -231-D-O

ESTELLA HAYNES ROBINSON, ADMINISTRATRIX
OF THE ESTATE OF WILLIE ROBINSON, JR., *et al.*,
Plaintiffs

v.

HENRY M. BUMP and MTD PRODUCTS, INC.,
and WILLIS C. HARRIS,
Defendants

[Refused by Court February 17, 1988; R. 636]

INSTRUCTION NO. P. 13

You are instructed that it was a violation of the Federal Highway Administration regulations for Defendant Henry M. Bump to have failed to restrain himself with his seatbelt at the time of this accident. You are further instructed that such conduct and violation of the regulation constitutes negligence as a matter of law. If you further find from a preponderance of the evidence that the Defendant Henry M. Bump's failure to comply with this regulation was the sole proximate cause or proximate contributing cause of the deaths and injuries of the Plaintiffs, then it is your sworn duty to return verdict in favor of the Plaintiffs against the Defendant Henry M. Bump and MTD Products, Inc. and assess money damages in accordance with the other instructions of this Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
MISSISSIPPI, DELTA DIVISION

Civil Action Nos. DC 84-221, -224, -227, -228, -231-D-O

ESTELLA HAYNES ROBINSON, ADMINISTRATRIX
OF THE ESTATE OF WILLIE ROBINSON, JR., *et al.*,
Plaintiffs

v.

HENRY M. BUMP and MTD PRODUCTS, INC.,
and WILLIS C. HARRIS,
Defendants

[Refused by Court February 17, 1988; R. 635]

INSTRUCTION NO. P. 14

You are instructed that a Federal Highway Administration Regulation found in Volume 49 of the Code of Federal Regulations at Section 392.16 provides: "A motor vehicle which has a seat belt assembly installed at the driver's seat shall not be driven unless the driver has properly restrained himself with the seat belt assembly." You are instructed that it was a violation of this regulation for Defendant Henry M. Bump to have failed to restrain himself with his seat belt at the time of this accident. You are further instructed that such conduct and violation of the regulation constitute negligence as a matter of law. If you further find from a preponderance of the evidence that Defendant Henry M. Bump's failure

to comply with this regulation was the sole proximate cause or a proximate contributing cause of the deaths and injuries of the Plaintiffs, then it is your sworn duty to return a verdict in favor of the Plaintiffs against the Defendant Henry M. Bump and MTD Products, Inc. and assess money damages in accordance with the other instructions of this Court.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

Case Numbers DC84-22-D-O, DC84-224-D-O,
DC84-227-D-O, DC84-228-D-O, DC84-231-D-O

ROBINSON, *et al.*,
Plaintiffs-Appellants

v.

BUMP, *et al.*,
Defendants-Appellees

EXCERPT FROM TRIAL TRANSCRIPT

(February 3, 1988)

* * * *

[558] THE COURT: Now, let me ask the plaintiff, do you gentlemen have any authority? I'd like to hear your authority. I'd like to hear from you.

[559] MR. SIMS: We have cases that don't deal with this specific regulation, but which deal with other highway regulations, such as where a—when a—there are highway safety regulations in the same code section which state exactly where a truck should pull off the road and—

THE COURT: What's the style of one of your cases?

MR. SIMS: Well, the *Strong* versus ——

THE COURT: *Freeman Truck Lines?*

MR. SIMS: Yes, Your Honor.

THE COURT: Yes, all right.

MR. SIMS: And the Mississippi Supreme Court recognized in that case that the federal law did preempt our

state law, and not only did it preempt it, it said that it furnished the standard of care which the driver would be held to, and it effectively legislated what a reasonable person must do in those situations.

THE COURT: That case, as I recall, involved the parking on an interstate highway?

MR. SIMS: Yes, Your Honor.

THE COURT: And the number of flares and flags, and so forth, that should be put to the rear of the truck?

MR. SIMS: Yes, Your Honor.

THE COURT: Well, there's no question that all of the CFR's pertaining to speed and lighting in fog pertain to [560] the operation of the vehicle to protect the public, the traveling public. And, of course, that Freeman Truck Line case, you put flares out behind your parked vehicle to protect the people coming behind you. Do you have any authority concerning seat belts?

MR. SIMS: There's been no reported decision on the seat belt issue and we have run it through all the computers. But I would say that the section you just mentioned concerning hazardous conditions is just two sections back from the seat belt section, and I think that you have to construe these statutes together, and I think the fact that the seat belt statute is 392.16, the care that you are supposed to use under hazardous conditions is 392.14, and I think it's clear that your wearing your seat belt is not only a safety protection to you, it's a safety protection from you getting knocked out of your seat and not being able to control your vehicle, which is exactly why we're trying to introduce it into evidence here.